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TRANSMITTED VIA EMAIL U.S. MAIL

April 1, 2013

Peter S. Holmes, Seattle City Attorney
Craig Sims, Criminal Division Chief
Seattle City Attorney's Office
700 5th Ave Suite 5350
Seattle, Washington 98124-4667
Email: Craig.Sims@seattle.gov

RE: Seattle Police Officer Clayton Powell's Use of Force on Mr. Ismail Abdella
Objective Review and Opinion - Revised

Dear Mr. Holmes:

Your office retained me to conduct an objective review of Seattle Police Officer Clayton Powell's Use of Force on Mr. Ismail Abdella on February 15, 2013. The scope of my review was limited to evaluating the likelihood of successful criminal prosecution by your office of Powell for his conduct vis-à-vis Abdella, which would be limited to criminal statutes that are "traffic infractions, misdemeanors, and gross misdemeanors [prosecuted] in Seattle Municipal Court."¹

From this framework, on February 28, 2013, I submitted my written report to your office, which explained my opinion that successful criminal prosecution of Powell by your office was unlikely. My review was based upon documents (police reports, 'CAD' printouts, memoranda, emails, and other internal documents) and videos (police station general area & holding cell videos, police in-car video, third-party video, and local news

¹ This information was per the Seattle City Attorney's Office, Criminal Division Website (2013).

station reporting videos) provided by your Criminal Division Chief, Craig Sims, and his staff. I also reviewed related documents and videos in the public domain. Chief Sims and his staff only provided materials for my review and did not in any way attempt to influence my opinion in this matter.

On March 18, 2013, Chief Sims contacted me to discuss my report, specifically requesting additional detail regarding my opinions about the use of force and the related internal investigation, and prosecution by the Seattle City Attorney's Office. On March 29, 2013, Chief Sims, Mr. Robert Greene, and I discussed the contents of a rough draft report. This letter is my final revised written report. Chief Sims and his staff did not in any way attempt to influence my opinion. My opinion has not changed since my report, dated February 18, 2013, and my review and opinion contained herein remain objective.

Introduction

I do not believe a conviction is likely under the statutes to which your office is jurisdictionally limited to prosecute Powell for his conduct. That said, Powell's conduct certainly calls into question his fitness as a law enforcement professional, and may even rise to criminal violation of civil rights under color of law. I reserve further comment regarding likelihood of successful prosecution by other entities (e.g., United States Department of Justice). I believe Powell's conduct would likely give rise to a successful tort and/or civil rights violation damages award, which may include punitive damages. Additionally, significant concerns were evident regarding the Seattle Police Department's organizational culture, including its apparent acceptance of Powell's conduct, its failures regarding supervision and management of its officers, and the lack of objectivity and sufficiency of its internal investigation (i.e., no UOF Report). While negligent training, negligent retention and related risk management issues certainly must be considered by the management of the Seattle Police Department and the City of Seattle, and misconduct must be addressed by the Seattle Police Department's Office of Professional Accountability, in-depth analysis of these issues is beyond the scope of this report, and are only commented upon to the extent that such issue(s) affect my opinion regarding successful prosecution of Powell by your office.

Background

On August 2, 2012, five Seattle police officers, including Powell, and one DOC officer, responded to an "Aggravated Assault" radio call at 3713 S. Othello Street, within the

City of Seattle. The officers determined a young, mentally-challenged boy was shot with a pellet gun as he rode his bicycle down a city street. The suspect(s) fled in a silver Honda. The officers conducted an investigation and located a vehicle matching the suspect nearby. At some point the officers had contact with certain young men, variously described as gang members, in the area where the vehicle was located. About 25 – 30 young men gathered and began yelling taunts at the officers. Some were yelling racial slurs at Powell. The tactical situation became precarious as the angry group surrounded the officers. Powell identified Mr. Ismail Abdella as an instigator.

Powell and Abdella became separated from the crowd and were soon embroiled in a face-to-face, one-on-one, heated verbal exchange. At some point prior to physical contact between the two, Powell removed his badge and hat. Apparently Powell intended to convey to Abdella that Powell was not afraid to engage Abdella physically as an 'ordinary person' and not as a police officer. Notably, other officers present did nothing to intervene in the emotionally escalating situation between Powell and Abdella.

As they stood face-to-face, Powell pushed Abdella at least three times², creating space between the two. Powell and Abdella were again almost immediately face-to-face after each push. During the heated verbal exchange after the third push, Abdella spat on Powell's face, understandably angering Powell. Powell pushed Abdella away a fourth time. Officer Dave Ellithorpe, who just arrived on scene, took Abdella into custody with Powell. During the handcuffing process, Powell grabbed Abdella's hair, pulling it back; Ellithorpe took no action to stop Powell. No statement from Powell was provided to explain his justification, and Ellithorpe was not asked during his interview to explain the justification for the "hair hold" he would have observed. Even though Powell became angry, the 'pushes' appear justifiable under the circumstances. However, the material provided to me does not include an explanation of the justification for the "hair hold" after Abdella was handcuffed and apparently not resisting.

Significantly, again, the other officers present did nothing to intervene to separate Powell from this situation, even though it was obvious Powell was acting irrationally, having removed his badge before physically engaging Abdella. This fact seems to reveal a deeper, systemic issue regarding the Seattle Police Department's organizational culture, specifically, that Powell's conduct here was, at least implicitly, acceptable, or perhaps even encouraged. Notably, the officers' statements and other materials that

² My first report indicates two "pushes" by Powell. Further review of the material reveals at least three pushes before Abdella spits on Powell, precipitating Powell's fourth and final push. This difference does not change my opinion.

were provided to me do not indicate any concern about Powell's conduct. I believe this creates certain prosecutorial problems for your office, as discussed further below.

According to Sergeant Eric Zerr, shortly after the field contact, Zerr was present at the South Precinct when Ellithorpe brought Abdella to the station. About "thirty seconds" later Powell arrives and 'self-reports' the incident to Zerr³. Powell admitted to Zerr that he "just lost [his] cool" in the field and that he was "sorry". Powell's statement could be interpreted as an admission that he used excessive force on Abdella, a 'cry for help' that he needed professional psychological/mental assistance, or both. Notably, Powell's statement to Zerr was made before Powell's contacts alone with Abdella in holding Cell-1, further discussed below. Even after being placed on notice of Powell's mental/emotional state, Zerr took no action at the time to remove Powell from the situation to ensure Powell had no further contact with Abdella.

Zerr checked with his lieutenant and, inexplicably, was directed to not complete a Use of Force report, as discussed further below. Zerr noted that Abdella did not appear injured, however there is no indication that Zerr asked Powell about any justification for his actions in the field.

Regarding its use in a criminal proceeding, Powell's statement to Zerr would likely qualify under certain hearsay exceptions (spontaneous utterance, present mental state, admission against interest, etc.) for use by prosecution as an admission that he knowingly committed an unlawful battery. However, in Powell's defense, one could argue, among other things, that the statement shows Powell was provoked by Abdella, perhaps negating the required intent element. Significantly, defense could also argue the Department's dalliance in managing (ignoring?) its employee's emotional, psychological, and/or mental wellbeing, after being placed on notice by Powell that he "just lost [his] cool", created the conditions that led to the events in the holding Cell-1 at South Precinct, as discussed further below.

Ellithorpe transported Abdella to the Seattle Police Department South Precinct and placed Abdella in holding Cell-1. Within minutes after Abdella is left in the holding cell, Powell came to Cell-1 alone. Powell opened the cell door and pointed his index finger, gesturing toward Abdella as Powell stood in the cell threshold. This first contact lasted about 14 seconds. Within about six minutes Powell returned to Cell-1 a second time. Powell looked inside through the window at Abdella and made gestures toward Abdella,

³ Apparently, shortly after this incident, certain news agencies were erroneously reporting that Powell's coworkers brought Powell's conduct to their supervisor's attention. A Department spokesperson issued an official statement shortly thereafter correcting this misinformation, stating that Powell reported the incident to his supervisor himself.

including giving Abdella the 'finger' (a vulgar gesture) as Powell stood outside the closed cell door. Powell then entered Cell-1, walked toward Abdella, and then suddenly rushed toward Abdella with a clenched fist. Abdella remained seated, hands cuffed behind his back. Powell made a final furtive gesture within inches of Abdella. Powell then exited the cell. This second contact lasted about 21 seconds. What, if anything, was said between the two would likely be in dispute, as the police station videos provided do not have audio. Abdella's statement regarding what was said was vague, at best, and, again, no statement from Powell was provided (or obtained?). In any event, subject to the jurisdictional limitations of prosecution by your office, successful criminal prosecution for Powell's conduct during these two contacts does not appear likely.

Later, while Zerr interviewed Abdella about the incident, Powell remained in the General Area just outside the open cell door, likely within hearing distance of the conversation between Zerr and Abdella. Allowing Powell to hear Abdella's comments during internal interview(s) creates additional concerns. At a minimum, such a practice calls into question the objectivity of the Department's internal investigation. Generally, allowing an officer, who is likely the subject of an internal investigation, to hear a complainant's interview would allow that officer to shape his/her own account based upon the knowledge of the complainant's statement. Additionally, under these emotionally charged circumstances, allowing Powell to eavesdrop on Abdella's interview also included the concern that Powell may become further enraged. Clearly, considering Powell's agitated state, a fact that had already been brought to Powell's supervisors' attention, Department management should have taken immediate measures to distance Powell from Abdella.

Zerr updated Lieutenant Michael Magee. When Magee went to Abdella's cell to follow-up, Abdella expressed concern that Powell may come after him. Notably, Abdella's concerns are expressed after Powell's earlier two contacts in the cell alone with Abdella. It appears at this point that Magee discussed the incident with Department command. A decision was then made to send Powell home and, inexplicably, to not complete a Use of Force Report.

A summary of investigative and other concerns include:

- No Use of Force Report was completed;
- Powell's statement was not obtained, or was not provided for review;
- Ellithorpe's interview did not explore the "hair hold" issue sufficiently;
- Powell was allowed access alone with Abdella after the UOF;
- Powell was allowed to monitor internal interview(s) with Abdella; and

- Department officers and supervisors failed to intervene when it was clear Powell became agitated and was acting irrationally.

Conclusion

Powell was clearly and admittedly emotionally beside himself in the field and at the station. Powell's conduct warrants scrutiny by the Seattle Police Department, and its stake-holders and monitors, as evidenced by the videos of the field contact and the conduct in the holding cell. Clearly, Powell's conduct indicates he should be evaluated regarding his fitness to continue in police service, however, based upon the material provided, I do not believe it is likely that your office would obtain a conviction for Powell's conduct, as further discussed below.

Regarding Powell's four 'pushes' and the "hair hold" in the field, Abdella's conduct (which included spitting in Powell's face) and Abdella's verbal provocation, which may have included racial epithets, would likely be used to justify the application of force, mitigate the penalty, or eliminate the requisite intent. Regarding Powell's conduct in the holding cell, while improper as a police officer, it does not appear to rise to the level of criminal culpability under the statutes and authorities applicable to prosecution by your office. Additionally, Abdella's credibility as a witness would likely come under attack, if for no other reason, due to his misleading statements (e.g. Abdella falsely denies spitting on Powell). Finally, a "de minimis" defense may apply under the facts here, specifically: Abdella was not physically injured, Powell did not have the option to simply walk away from a radio call but was forced to deal with the tense field situation, and Powell's coworkers and supervisors failed to intervene.

The Powell/ Abdella confrontation may be analyzed in two significantly different ways:

- First, as an unreasonable police use of force under color of law under "Graham"⁴ (criminal violation of civil rights, which, I understand, your office cannot prosecute); and
- Second, as two emotionally-charged individuals engaged in a "mutual combat" where both are challenging each other, both are roughly equally culpable and, since no one was injured, the conduct is deemed "de minimus" under the governing statutes.

Evaluating Powell's conduct as a Police Use of Force may prove challenging at this time. Proper analysis of a police Use of Force requires proper, timely documentation of the

⁴ See *Graham v. Conner*, 490 U.S. 386 (1989)

evidence and facts. Significantly, interviews of the involved officers (at least Powell and Ellithorpe) and witnesses (police and civilian) would be required. Powell and Ellithorpe were not interviewed to determine their justification, and no Use of Force report was completed. The only insight provided to me regarding Powell's mindset in the field was Zerr's claim that Powell admitted to "losing it". This should not be taken to mean that Powell could not be successfully prosecuted for criminal civil rights violations, or other related criminal conduct under "color of law". Certainly, the video evidence and witness statements may be sufficient for successful criminal violation of civil rights under color of law prosecution, which would typically be sought by the United States Department of Justice, or perhaps the King County Prosecuting Attorney's Office. However, as I understand it, prosecution for criminal violation civil rights under color of law is beyond the prosecutorial jurisdiction of your office.

In essence, both participants, Powell and Abdella, were challenging each other to engage in the physical altercation during their contact in the field. Analyzed under the relevant statutes available for prosecution by your office (specifically, traffic infractions, misdemeanors, and gross misdemeanors), it appears Powell's conduct in the field (pushes and hair hold) would be viewed as mutual combat. Further, Powell's conduct in the holding cell would amount to merely threatening conduct without physical contact. As neither party was injured during the "mutual combat" or during Powell's subsequent threatening gestures toward Abdella in the holding cell, a "de minimus" defense would likely apply. Additionally, Powell may claim provocation (or some other similar defense theory) - Abdella was provoking him, using racial epithets and spitting in Powell's face.

Significantly, Powell may also claim his conduct was so obviously irrational, he was experiencing temporary insanity (or some other similar defense theory), and the other officers on scene did nothing to intervene. This analysis is further complicated by the fact that if your office undertakes prosecution of Powell, one must ask: why are the other officers and supervisors not subject to prosecution for implicitly condoning, or even encouraging Powell? While the "organizational culture" concern cannot be ignored, further analysis of this issue is beyond the scope of this report. Regarding analysis of Powell's conduct as a police Use of Force, this is difficult, at best, in the absence of a Use of Force Report. Powell's conduct in the field and at the station holding cell certainly may be viewed as unreasonable under Graham, however, I cannot say for certain without the involved officers' statements (Powell and Ellithorpe).

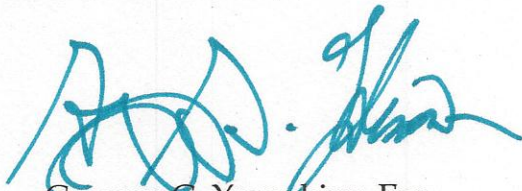
Based upon the foregoing, I believe successful prosecution of Powell by your office is unlikely. While this report offers greater detail than my earlier report, my opinion has

Letter to Peter S. Holmes, Seattle City Attorney - April 1, 2013

Re: Seattle Police Officer Clayton Powell's Use of Force on Mr. Ismail Abdella-Objective Review and Opinion-Revised
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not changed. I remain prepared to meet with you and your staff to discuss my earlier report and this revised report. Please let me know if you require additional information.

Respectfully,

A handwritten signature in blue ink, appearing to read "Gregory G. Yacoubian, Esq.", with a stylized flourish at the end.

Gregory G. Yacoubian, Esq.

GY:hc